United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7101

United States Court of Appeals
FOR THE SECOND CIRCUIT

SALEM INN, INC. and M & L REST, INC.,

Plaintiffs-Appellees,

against

LOUIS J. FRANK, individually and as Police Commissioner of Nassau County, FRANK DORAN, individually and as Town Attorney of the Town of North Hempstead, and HOWARD EINHORN, individually and as Chief of Police of the Village of Port Washington,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York dated January 2, 1975, declaring Chapter 11 of the Code of the Town of North Hempstead unconstitutional, and enjoining enforcement thereof.

Facts

On July 10, 1974, the Town of North Hempstead enacted Chapter 11 of the Code of the Town of North Hempstead (the Chapter) which prohibited nudity in certain enumer-

ated and defined places of public accommodation within the territorial jurisdiction of the Town (8a).

Plaintiffs, Salem Inn, Inc. and M & L Rest, Inc., commenced an action for a declaratory judgment and for an injunction against the enforcement thereof on the grounds that the Chapter was unconstitutionally overbroad (6a) and violated the rights guaranteed to them under the First Amendment of the Constitution. The plaintiffs also asserted that the application of the Chapter to certain enumerated places, while exempting certain others from its application, violated the Fourteenth Amendment of the Constitution of the United States.

The District Court rendered its decision upon a motion for a preliminary injunction holding the Chapter unconstitutional on September 10, 1974 (37a). Thereafter defendant, Frank Doran, moved for an immediate trial of the issues, and plaintiffs cross-moved for summary judgment upon the ground, no triable issues of fact existed in the case. By unsigned undated decision (53a) the District Court granted summary judgment to plaintiffs and an order for final judgment was entered January 2, 1975 (49a). Defendant, Frank Doran, appeals.

POINT I

The court below erred in determining Chapter 11 of the Code of the Town of North Hempstead overbroad on its face and should be reversed.

The doctrine of overbreadth is a narrow and judicially limited doctrine, to be exercised only as an exception to the usual procedure in reviewing the constitutionality of statutes. The District Court erred in the application of these rules in this action and should be reversed. *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973). The rules regarding overbreadth determination are limited to statutes which are

directed to "spoken words" (413 U.S. at 615). Since the Chapter affects conduct application of the doctrine to the facts in this case is error. *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973); *United States Civil Service Commission* v. *National Association of Letter Carriers AFL-CIO,* 413 U.S. 548 (1973).

The court below, upon this basis found the Chapter was a substantial curtailment of constitutional rights.

The decision below grounded its holding upon the court's determination that the Chapter was "facially overbroad" (40a, 42a) because ". . . it *may* result in an infringement upon free expression . . ." The plaintiffs' claim of facial overbreadth, was an assertion that the law "as applied," created a chill of the plaintiffs' rights of expression, was in deprivation of the rights of patrons to view "protected" expression, bore no relationship to a governmental purpose and was suppressive (6a). As such, the plaintiffs presumed that topless dancing in a bar is constitutionally protected (6a). "Topless dancing" has never been afforded absolute protection of the First Amendment to the Constitution. Even this Court has stated that "nude dancing *may* be protected, . . ." (emphasis supplied). *Salem Inn, Inc.* v. *Frank,* 501 F. 2d 18 (2nd Cir. 1974). The assertion of absolute protection was not even raised by the plaintiffs. Their assertion of a *chill* to their "presumptive" First Amendment rights (6a), or the deprivation of the rights of their customers to view topless dancing, or, for that matter of the dancers to dance does not constitute sufficient grounds to hold the statute overbroad.

A statute is overbroad if the prohibition interferes with unprotected and protected activity with one broad sweep. *Thornhill* v. *Alabama,* 310 U.S. 88 (1940). Plaintiffs, even then, must show some affect of the Chapter on their own constitutional rights. *Younger* v. *Harris,* 401 U.S. 67 (1971);

Dombrowski v. *Pfister,* 380 U.S. 479 (1965). In other words plaintiffs must demonstrate The Chapter is "overbroad" as applied to them. As a result, they must show activity in which the wish to engage is a protected activity, and that as such, is absolutely without the realm of regulation, by reason of the protection of the First Amendment. *Younger* v. *Harris,* 401 U.S. 67 (1971).

Dancing, has been recognized as a protected activity, and even nude dancing in a bar, *can* be afforded the protection of Freedom of Speech under the First Amendment to the Constitution. *California* v. *LaRue,* 409 U.S. 109 (1969); *Salem Inn* v. *Frank,* 501 F.2d 18 (2nd Circuit 1974). Only if plaintiffs' activity is protected activity would they be entitled to a determination of the constitutionality on the ground the Statute was overbroad. Plaintiffs are not, however, in this case entitled to a declaration of overbreadth of the statute.

When there is a challenge to a statute upon the ground the same is overbroad, and that statute regulates conduct, the doctrine of overbreadth may not be applied. Even if the conduct regulated or prohibited contains elements of expression, incidental to the conduct, the rule remains the same. In *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973), the Supreme Court stated the rule as follows:

> ". . . overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner. See *United States* v. *Harriss,* 347 U. S. 612 (1954); *United States* v. *CIO,* 335 U. S. 106 (1948); cf. *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367 (1969); *Pickering* v. *Board of Education,* 391 U. S. 563, 565, n. 1 (1968); *Eastern Railroad Conference* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127 (1961).
>
> It remains a 'matter of no little difficulty' to determine when a law may properly be held void on its

face and when 'such summary action' is inappropriate. *Coates* v. *City of Cincinnati,* 402 U. S. 611, 617 (1971) (separate opinion of Black, J.). But the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' towards conduct and that conduct —even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. Cf. *Alderman* v. *United States,* 394 U. S. 165, 174-175 (1969). To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."

The rule is, therefore, that where the speech devolves to conduct, the more susceptible to regulation the activity becomes, and the further from summary application of the constitutional review via overbreadth. *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973); *United States* v. *O'Brien,* 391 U.S. 367 (1968).

The Supreme Court of the United States has held "topless" dancing is conduct and contains a minimal amount of expression. *California* v. *La Rue,* 409 U.S. 109 (1969). The court below recognized this minimum of expression

(40a). As conduct, the activity of the topless dancing itself is not within the reach of overbreadth review because it is reserved to statutes involving free speech. Further, the plaintiffs herein are not dancers, they are bar owners. They do not assert their right to present topless dancing, but their right to present a mode of "expressive conduct," presumptively protected, and the rights of their patrons to view the same. (6a)

A corollary rule to the rules of overbreadth determination requires the plaintiffs assert their own rights and not those of others. *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973). The vicarious assertion of the rights of the dancers and of their customers is improper. The error of the court below was the interpolation of the plaintiffs claims to possible application of the Chapter to "Hair" and Ballet Africans. (40a) The court below said: "The sweep of the ordinance is so broad that it may be applied to communicative dancing . . ." It is submitted that this is error, and that to which it may be applied should not have been considered.

An exception to the application of overbreadth to plaintiffs who engaged in such "hard core" conduct as to be within the prohibitions of the law, no matter how narrowly it is construed, is undisputed. *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), *Younger* v. *Harris,* 401 U.S. 67 (1971). The confusion of the application of overbreadth has been the trend to expand application of this extraordinary remedy to conduct cases. The Supreme Court has now clarified and unequivocally reserved the doctrine of overbreadth review to "spoken words." *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973). *Broadrick* no more than emphasizes the rules that have always existed. The statute under review, if directed at conduct, even if it contains incidental expression will stand if it meets the criteria of *United States* v. *O'Brien,* 391 U.S. 367 (1968). Statutes are constitutional if their subject is within the gov-

ernmental power to regulate, are based upon a compelling governmental interest, are no broader than is necessary to accomplish their end, and are non censorial (aimed only at certain groups or viewpoints) or unrelated to the suppression of free expression. If these criteria are satisfied plaintiffs must show the statute is unconstitutional "as applied" *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), or not capable of some narrowing limited application to such "hard core" conduct, which is prohibited by any reading of the statute. *Younger* v. *Harris,* 401 U.S. 67 (1971). The latter rule stated another way, is the traditional requirement that a challenge to a statute on the grounds that it is overbroad on its face must be based upon the fact that the conduct prohibited could not be prohibited, even if by some narrowly drawn statute. *California* v. *La Rue,* 409 U.S. 109 (1969). Nudity is conduct which can be regulated. *United States* v. *Hymans,* 463 F. (2d) 615 (10th Cir. 1972). In cases of conduct with incidental speech the Supreme Court has consistently applied this reasoning. Therefore, the *Broadrick* clarified the requirement a plaintiff demonstrate the incidental expression contained in conduct has been *substantially impaired.* 413 U.S. 601, at page 615.

In this case Plaintiffs merely assert the rights of others to view or perform. They did not offer proof, nor based upon the record below could they prove substantial interference with First Amendment right of their own. Only Nudity is forbidden by the Chapter. The Plaintiff must therefore under these circumstances prove the nudity is *part* of the expression and by reason of its elimination the expression is substantially impaired. The Plaintiff's could not, by any stretch of reasoning prove that topless dancing, in promotion of the sale of liquor, contains the necessary expression to make the Chapter's infringement *substantial. California* v. *La Rue,* 409 U.S. 109 (1969). The popularity of Plaintiffs establishments is due, not to dancing, but due to the nudity. Dancing is no more or less

protected by reason of the costume incidental to it. It is the costume which obtains the protection by reason of the protection afforded to the dance. The case of the "right thing in wrong place" is probative in this case. *Euclid* v. *Ambler Realty,* 272 U.S. 365 (1926). In some situations nudity is afforded the protection Plaintiffs claim for their own. *Salem Inn* v. *Frank,* 501 F.2d 18 (2nd Cir. 1974). Nudity in abstract, is not afforded such protection. The court below observed this very fundamental and crucial fact. *United States* v. *Hymans,* 463 F. (2d) 615 (10th Cir., 1972). (41a) It, however, switched the burden to the defendant to prove a compelling governmental interest when regulating nudity which *may* contain expressive elements. (42a) This is not the law. Only after a quantum of expression is determined to exist in the conduct under scrutiny, can it be examined to find if burden of the prohibition is substantial. *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973), *United States* v. *O'Brien,* 391 U.S. (1968). The examination should be confined to the statute itself, the conduct prohibited and application to plaintiffs and not to some speculative application and not to some possible prohibitions of action which plaintiffs suggest, other persons may undertake. *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973). The record of the public hearing shows the compelling governmental interest. (42a) The court below recognized its presence. Its error over application of the principles of overbreadth.

Where expression moves to conduct, where the expressive element is minimal, the burden is upon the plaintiff to demonstrate the interference is substantial (*Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973). This is especially true in case of conduct which may otherwise be subject to valid regulation of State Law. *California* v. *La Rue,* 409 U.S. 109, at 117.

The application of the rules is difficult. It is a matter of interpretation of the facts in each individual case. The legislative action against that which may be subject of

otherwise valid criminal laws and could disrupt peace, safety, and welfare in a place of public accommodation is controlling; *California* v. *La Rue,* 409 U.S. 109 (1969). The legislature need not wait until the circumstances generating the *California* v. *La Rue,* type regulations, rise, before it acts. It may consider all edges of the cube, in advance, and arrive at its determination. It may act based upon these considerations without more. Once it has acted the Court below should not consider, in the absence of an abuse, or abritrariness other reasons to overturn the legislative finding. (41a) Even in anticipation of the such, without any conclusion as to the peoples and places who may partake of the entertainment or partake in its presentation, the legislative decision to avoid the possible consequences should be left to stand. This is the essence of legislative action. *United States Civil Service Commission* v. *National Association of Letter Carriers AFL-CIO,* 413 U.S. 548 (1973). In *Civil Service Commission* v. *National Association of Letter Carriers, AFL-CIO,* 413 U.S. 548 (1973), the Supreme Court recognized the right of the legislature to act upon the anticipation that the conduct, prohibited, if not prohibited, could lead to the illegitimate or unseemly results. In upholding the prohibitions in the Hatch Act (*5 USC Section 2734 (a) 2)* forbidding certain Federal Employees, from engaging in partisan political activities the Supreme Court said:

> "The Government, the Court thought, was empowered to prevent federal employees from contributing energy as well as collecting money for partisan political ends: Congress and the President are responsible for an efficient public service, if in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers we see no constitutional objection."

A strong analogy may be drawn in this case. The legislature method should be left to the legislative mind to de-

termine the manner in which to effect its legislative ends. The existence and enforcement of other laws which could reach the same result is not controlling. (41a) Some other legislative body may not agree with this method. But if this method is chosen, it is not unconstitutional. *National Civil Service Commission against National Association of Letter Carriers,* 413 U.S. 548 (1973).

With the admittedly wide latitude of the Police Powers to foster the health, safety, welfare and morals of society *California* v. *La Rue,* 409 U.S. 109 (1969) and by reason of the limitation of the effect of the Chapter to certain specifically enumerated places, while clearly exempting others from the prohibitions, the Chapter does not constitute an across the board prohibition decried by this Court in *Salem Inn* v. *Frank,* 501 F. 2d 18 (2nd Cir. 1974). It is a narrow restrictive statute directed at the topless dancing. Nudity in public places is the proper subject of the regulations by the state police power. *United States* v. *Hymans,* 463 F. 2d 615 (10th Cir. 1972). The fact that the nudity is in an indoor public place does not alone change the rights of the government to regulate the same. The error of the Court below there is based upon the failure to note that "the permissible scope of state regulation" *California* v. *La Rue,* 409 U.S. 109 (1969) is substantially expanded by reason of the nudity being susceptible to regulation.

The court should have reasoned in the manner outlined above and found for defendant for the following reasons:

1. The chapter only prohibits nudity, not dance, nor entertainment, in the context of its use as a *promotional* device, its limitation on the expressive aspects is as the *very most* minimal.

2. Neither plaintiff has demonstrated the First Amendment protects the activity for which they contend protection because they fall within the "Hard core" conduct

prohibited by the act, and have failed to demonstrate or even claim they wish to engage in some activity which may be protected.

3. The vicarious assertion of the rights of the customers or the dancers cannot serve as the basis for overbreadth review. Likewise no speculative applications of the chapter to conduct activities not under review is proper to a decision of constitutionality. The test is one of substantial interference with some protected activity which renders the law in question subject to a facially overbreadth determination.

The Court below should be reversed.

POINT II

Chapter 11 of the Code of the Town of North Hempstead does not violate the Fourteenth Amendment to the Constitution.

The argument advanced and adopted in the court below, that the Chapter violated the fourteenth amendment was based upon the court's determination that the Chapter had "no other purpose . . . than to chill the assertion of constitutional rights", *United States* v. *Jackson,* 390 U.S. 570 (1968); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969). (42a) Once the District Court had determined the "facial unconstitutionality of the Chapter", the court could quickly dispose of the equal protection arguments. In the decision below, the prohibition of presumed protected activity in a bar or cabaret, could not be reconciled with the exemption of the prohibition in the theatre. (43a) The stumbling block would appear to be the court's failure to recognize the deterrent contained in the statute did not involve the right to dance, or for that matter the right to dance naked, but was limited in application to its stated legislative purposes. (8a) The Chapter's legislative pre-

amble limits its affect to places where food and drink are to be sold. Similarly each definition contained in the Chapter contains a clear, precise reference to food and drink. (8a, 9a)

The court below applied the "strict scrutiny" test to the plaintiffs' claims. (42a) *Shapiro* v. *Thompson,* 394 U.S. 618 (1968); see also *O'Neill* v. *Dent,* 364 F. Supp. 565 (E.D.N.Y. 1972). In this case, the court below chose to examine the statute as a "fundamental rights" case, *Shapiro* v. *Thompson,* 394 U.S. 618 (1968), upon the assumption that plaintiffs' right of free expression under the first amendment had been violated. (43a) Giving the Chapter strict scrutiny, the court sought a "compelling state interest" to justify the "unequal" classifications in the chapter. Grounded, therefore, on the conclusion of the existence of fundamental rights, the "state interest" rational led the court below to find an unjustifiable legislative classification. The determination of the existence of a fundamental right allowed the court below to avoid application of a less rigid standard for scrutiny of legislative classifications.

It is submitted that since the chapter was not directed to the right of expression, but to nudity (with possible incidental expressive elements (Point I, *supra*)), a less rigid test should have been applied. *Boraas* v. *Village of Belle Terre,* 476 F. 2d 806 (2nd Cir. 1973), reversed on other grounds 416 U.S. 1 (1974); *O'Neill* v. *Dent,* 364 F. Supp. 565 (E.D.N.Y. 1972). Under the test that should have been applied, equal protection is satisfied if there is a factual finding that the classification is substantially related to the object of the statute. *Reed* v. *Reed,* 404 U.S. 71 (1971).

The legislative preamble to the chapter stated the concern of the Town Board for the "increasing trend of nude and seminude acts . . . in bars and restaurants where food and drink are sold". It stated further its concern was with

"nudity and the commercial promotion and exploitation thereof in bars and restaurants". (8a) In the words of Chief Justice Warren: "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (*McGowan* v. *Maryland*, 366 U.S. 420 (1960).)

Relevant to this point is the factual setting under which the Chapter was enacted. This court had affirmed the court below setting aside an earlier local law regulating nudity in the Town of North Hempstead upon the ground ". . . (it) . . . inhibits the full exercise of first amendment freedoms and is overbroad in that 'any public place' could include the theatre, town hall, opera house . . . (and) . . . prohibit any number of works of unquestionable artistic and socially redeeming significance. . . ." *Salem Inn* v. *Frank*, 501 F. 2d 18 (1974). Prompted by this court's admonition, the Chapter was drafted to exclude those places most likely to have artistic productions and to include those least likely to have such artistic productions. The legislative conclusion was that those places using nudity as a promotional gadgetry were the proper and correct target of the statute and proper to its purpose. Such are the "state of facts" to logically justify the classifications in the chapter. So too, nudity prohibited (regulation of costume) in bars but not in theatres is a logical distinction buttressed on the intent of the legislature to ban commercial exploitation nudity (topless dancing) in the place where, as promotion of the sales of drinks, it is furthest removed from artistic expression. *California* v. *La Rue*, 409 U.S. 109, see also *Crownover* v. *Musick*, 9 Cal. 3rd 405, 107 Cal. Rptr. 681 (Sup. Ct. Cal. 1973), (cert. den. 415 U.S. 931 (1974)); *Portland* v. *Derrington*, 253 Ore. 289, 451 P. 2d 111 (Sup. Ct. Ore. 1969), (cert. den. 396 U.S. 901, 1969).

This case requires the application of this "minimal scrutiny test" for reason of the absence of a suspect classi-

fication (race, sex, religious conviction), and by reason of the absence of a fundamental right (See Point I *supra,* arguing dancing is protected and nudity in abstract is not protected, except by reason of obtaining the same, as a costume). Once so tested it must be held constitutional. "The Constitution is satisfied if a legislature responds to the practical living facts with which it deals." *McGowan* v. *Maryland,* 366 U.S. 420 (1960).

Even if, for the purpose of argument, it is necessary to go beyond the practical living facts of the case the court could have determined the existence of the compelling governmental interest in support of the chapter. Twice now has this appellant heard before the public hearing the complaints of the citizens of the Town of North Hempstead. Twice the court below reviewed a transcript of the public hearing. Yet each time the court below has determined that there was lacking a compelling governmental interest (53a). The court bent in favor in each review of what it determined to be communicative conduct (53a). It avoided the determination of the quantum of expression in topless dancing which renders the chapter's interference nonsubstantial. *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973); *United States* v. *O'Brien,* 391 U.S. 367 (1968). So too the fear of the court below that the chapter could preclude the performance of artistic productions, such as "Hair" and the Ballet in plaintiffs' establishments, fails to recognize no plaintiff has claimed he wants to put on such a production, or for that matter, is likely to do so. The absence of plaintiff's claim that they fear they cannot present "Hair" or the Ballet, and the absence of any proof that they are likely to go beyond the presentation of nudity as a promotional device, should also have been considered by the court below in determining the existence of a *substantial* infringement of *plaintiffs'* right of expression. *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973). Since no fundamental right is involved the "rational relationship test" should have been applied.

The decision of the court below is an erroneous application to test for constitutionality under the fourteenth amendment of the United States Constitution and should be reversed.

CONCLUSION

The court below should be reversed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEWYORK

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Juan Delgado, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 596 Riverside Drive, New York.
That on March 21, 1975, he served 2 copies of Appendix and Brief for Appellant on

KASSNER & DETSKY,
Attorneys for Plaintiffs-Appellees,
122 East 42nd Street,
New York, New York 10017

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Juan A. Delgado

Sworn to before me this
21st day of March, 1975

John V. Desposito

JOHN V. DESPOSITO
Notary Public, State of New York
No. 30-0592950
Qualified in Nassau County
Commission Expires March 30, 19 7 5